No. 14743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Appellee adopts the jurisdictional references of appellant's brief.

QUESTIONS PRESENTED

1. Whether the indictment under 2 U.S.C.A., Sec. 192, charging refusal to answer questions at a hearing of a Subcommittee of the House of Representatives, stated an offense against the United States.

2. Whether the evidence was sufficient to support the verdict and judgment.

3. Whether the Court committed prejudicial error in its rulings upon the following procedural matters: Motion for subpoena duces tecum and inspection prior to trial, motion for continuance, empaneling the jury, rulings on evidence, motion to reopen after verdict, motion for new trial on ground of newly-discovered evidence.

4. Whether the trial court's instructions were fair and complete.

5. Whether the trial court properly found the questions pertinent and the refusals to answer not privileged.

STATUTES AND RULES INVOLVED

2 U.S.C.A., SEC. 192.

Federal Rules of Criminal Procedure:

Rule 16. Discovery and Inspection

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena

(c) *For Production of Documentary Evidence and of Objects.*

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT OF THE CASE

Appellant was convicted by jury trial of refusing to answer questions pertinent to questions under inquiry by a Subcommittee of the Un-American Activities Committee of the House of Representatives, United States Congress, on five counts of a six-count indictment. Count 3 was dismissed by the court. Appellant, at the trial below, asserted through counsel, *inter alia,* that his refusals had been privileged and the questions not pertinent to the subject under inquiry. Appellant has specified one supplemental specification and twenty-four specified alleged errors by the District Court, No. 16 of which appears abandoned. Many of the specifications appear duplicitous and for convenience and clarity of organization, appellee's brief discusses the errors alleged by appellant in other than numerical order.

ARGUMENT

I.

THE INDICTMENT WAS LEGALLY SUFFICIENT.

A. It is not necessary to expressly allege willfulness in the charge.

Fields v. U.S., D.C. Cir. 1947, 164 F.2d 97; cert den. 332 U.S. 851, 1948; *U.S. v. Deutch,* Case No. 13060, C.A. D.C., decided July 26, 1956; *Sinclair v. U.S.*, 279 U.S. 263, 1929; *Dennis v. U.S.*, D.C. Cir. 1948, 171 F.2d 986; aff. 339 U.S. 162, 1950.

B. It is not necessary to allege facts to negative possible defenses.

Eisler v. U.S., D.C. Cir. 1948, 170 F.2d 273; cert. den. 338 U.S. 883, 1949.

C. It is not necessary to allege the evidentiary facts showing pertinence, but allegation of pertinence was in fact made by reference to the appropriate Congressional action establishing the Committee and its scope of investigation, together with the particular pertinent questions charged.

Sinclair v U.S., supra.

D. Facts to support the offense defined by 2 U.S. C.A., Sec. 192 were alleged.

U.S. v. Josephson, 2 Cir. 1948, 165 F.2d 82; cert. den. 333 U.S. 838, 1948; *Morford v. U.S.*, D.C. Cir. 1949, 176 F.2d 54.

E. Elements of the offense are (1) appearance before an authorized committee of Congress; (2) refusal to answer questions pertinent to the subject under inquiry.

Townsend v. U.S., D.C. Cir. 1938, 95 F.2d 352, cert. den. 303 U.S. 664, 1938; *In re Chapman,* 166 U.S. 661, 1897.

The indictment alleges facts supporting the elements of the offense. It alleges that a duly authorized Subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings pursuant to Public Law 601, Sec. 121, 79th Congress, 2d Session (60 Stat. 828) and to House Resolution 5, 83d Congress. Consulting these references would show the appellant that Public Law 601, *supra,* established the Un-American Activities Committee and empowered it or its Subcommittees to hold hearings and require testimony of witnesses. Its scope of investigation was therein defined. House Resolution 5, 83d Congress, stated the rules for that Congress and reiterated the authority of the Committee enunciated by said Public Law 601.

The indictment further alleges that the appellant appeared before the Subcommittee on June 19, 1954 in the State and District of Oregon and was asked questions which were pertinent to the question then under inquiry, which questions are set out as separate counts, and alleges that the appellant refused to answer those pertinent questions.

Thus, the indictment alleges the authorized Committee and its statutory purpose, the appearance of the appellant and his refusal to answer questions pertinent to the subject under inquiry.

Appellant asserts that the indictment fails to allege

the "question under inquiry" and is thereby defective. Congress can be presumed to act lawfully and the reference in the indictment to the statute, stating these purposes, serves the double function of advising appellant of the authority of the Committee and the scope of its inquiry. No bill of particulars was sought; no surprise is claimed; no danger of double jeopardy exists. The appellant could have had no doubts as to the question under inquiry. *Morford v. U.S., supra.*

The appellant further asserts that the indictment does not show *how* the questions asked were pertinent to the question under inquiry. Appellee submits that appellant would require the pleading of purely evidentiary matters. The general rule is that indictment in the language of the statute is sufficient if thereby a defendant is fully advised of the charge. It cannot reasonably be, and is not in appellant's brief asserted, that the appellant was inadequately advised by the indictment of the charge against him. The statute defined the refusal to answer the pertinent questions as the offense—not *how* they were pertinent. The questions must be pertinet, but pertinence is a matter of law for determination by the Court.

Appellant further complains that the indictment is defective in not alleging that the appellant acted willfully, wrongfully or unlawfully. Willful refusal is not a necessary element in the second clause of 2 U.S.C.A., Sec. 192 under which this charge is brought. The court properly, by instruction, required showing of an intentional refusal. See *Chapman v. U.S.,* 8 App. D.C., 302 at 316, 319, 1895; *Sinclair v. U.S., supra,* at 299. But the ele-

ment of a deliberate act embraced in the word "refused" (to answer) involves the same intent amounting to deliberate, not inadvertent, failure, as required to show willfulness under the first clause of the Act. See *Fields v. U.S., supra; In re Chapman* and *U.S. v. Deutch, supra.*

Appellant finally asserts that the questions asked were innocuous and inconsequential and therefore not proper bases for indictment. He also asserts that questions were "ominous" in their setting. Identity of a witness, the crux of these questions, appears clearly pertinent to support such testimony as may be adduced from a witness. Only if the answers be shown privileged by the witness, a matter of defense, should refusal of a responsive answer be lawful. Appellant's assertion that the indictment should negative privilege is without support, as is attacking the indictment by alleging that factually the Committee knew the answers and asked the questions for other than a legislative purpose. See *Morford v. U.S., supra.*

II.

THE EVIDENCE SUPPORTS THE CHARGES, VERDICT AND THE JUDGMENT.

A. Pertinence of questions was a matter for the court, with or without receiving evidence.

Chapman v. U.S.; Fields v. U.S.; U.S. v. Josephson; Morford v. U.S.; Sinclair v. U.S., supra.

B. Appellant appeared at hearing, upon summons, to give testimony.

Tr. of Proc., part 2, page 21.

C. Having appeared, appellant refused to answer questions of the Committee pertinent to questions under inquiry.

Tr. of Proc., part 2, pages 22-43.

D. Refusal to answer the questions was deliberate and intentional and the appellant was specifically directed to answer the questions charged in the indictment.

Tr. of Proc., part 2, pages 22-43.

The questions were pertinent to the matter under inquiry. Pertinency was a question of law for the court to determine, with or without receiving evidence. Pertinency is established by the statutory and factual scope of the inquiry, itself, the fact that the questions were identifying in nature and by the testimony of the witness Robert L. Kunzig, counsel for the Committee, referred to above (C & D), who further elaborated for the benefit of the court. The record supports the Court's finding. *U.S. v. Josephson, supra.*

III.

PRIVILEGE WAS IMPROPERLY CLAIMED.

A. Counts 1 and 2 respectively charged appellant with refusing to answer questions:

> "Mr. Simpson, would you please state your residence?" and
>
> "Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?"

B. Counts 4 and 5 respectively charged refusal to answer the questions:

"Would you give this committee, please, a brief resume of your educational background?" and

"Now, Mr. Simpson, did you ever go to high school?"

C. Count 6 charged the appellant with refusing to answer to question:

"Were you ever in the armed forces of the United States?"

Amendment 1, United States Constitution, is not a proper basis for appellant to claim privilege herein. *Barsky v. U.S.,* D.C.. Cir. 1948, 167 F.2d 241; cert. den. 334 U.S. 843, 1948.

Amendments 9 and 10 are inapplicable as a defense. The rights retained by the people did not preclude Congressional investigations. *McGrain v. Daugherty,* 273 U.S. 135, 1927; *Sinclair v. U.S., supra.*

Amendment 14 is inapplicable. State action is not involved in this inquiry.

We now turn our attention to the claim of privilege under Amendment 5 of the Constitution, the only seriously-urged basis of privilege. The clause of the Fifth Amendment to the United States Constitution for consideration here, reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

We observe here that appellant was not appearing as a defendant in a criminal case. He was a witness before a Committee of the Congress. Appellee further observes that the constitutional provision has been enlarged by

interpretation to protect any witness before a court, grand jury or congressional committee who declines to answer any question which may tend to incriminate the witness, if the answer would form a link in the chain of evidence which would assist in prosecution for a federal crime. We further observe that the United States Supreme Court has repudiated the interpretation of those who submit that one claiming privilege acknowledges that he has committed an offense, (*Ullman v. U.S.*, 350 U.S. 422, 1956; *Emspak v. U.S.*, 349 U.S. 190, 1955) reasoning that the witness is entitled to invoke the privilege in an "ambiguous circumstance". We have also noted that this court, in *Jackins v. U.S.*, 9 Cir. 1956, 231 F.2d 405, approved and applied the language of *Hoffman v. U.S.*, 341 U.S. 479, 1951, in which the court said:

> "It was not '*perfectly clear*', from a careful consideration of all the circumstances in the case, that the witness [was] mistaken, and that the answers cannot '*possibly* have such tendency' to incriminate."

Despite these observations, we respectfully urge with all emphasis at our command, that the record before this court in this case supports the trial court's rulings concerning privilege.

Circumstances before the court were: a witness had been summoned to give testimony before the House Committe on Un-American Activities; he appeared after some witnesses—before others; the hearings were televised, but at appellant's request, he was not televised. Perhaps two witnesses—one before and one after the

swearing of the appellant—testified that appellant had been a communist (Tr. of Proc., part 2, page 80). The appellant, after stating his name, refused to answer any other of the identifying questions referred to in the indictment. He was specifically directed to answer each of those questions after he had claimed privilege. The record fails completely to afford any basis for the trial judge to affirmatively say that the answers could in any way tend to incriminate the witness.

It may be suggested that to show the court why the answers would incriminate, would require revealing the very fact which the privilege protects. We earnestly suggest that a showing of true tendency to incriminate is the burden of the defense—not of the court. It should not be incumbent upon the court to weave a speculative fabric of incrimination from a naked claim of privilege. The trial court is entitled to some help from the defense when the privilege is claimed and challenged, be it in the form of testimony or in some form which can then be examined. Though the burden in a criminal case does not shift, requirement of going forward with evidence may.

Witnesses, as such, are subject to compelled testimony throughout our governmental and judicial structure, absent recognized privilege. Only a defendant in a court, charged with crime, has a right to absolute silence. Other witnesses must, subject to penalty, give benefit of their knowledge of facts to the tribunal, *unless* privileged. One class of privilege is that against self-incrimination. The privilege is cherished for its just use, but its abuse should not be permitted. We can con-

cede that the privilege should be construed liberally for one asserting it, but along with the *right* to the assertion is the ever-present corresponding *duty* to support the claim. Herein, in Count 1, the appellant was asked to state his residence; there is nothing in the record to show that the witness feared incrimination from the answer. There is no basis in the record for application of *Starkovich v. U.S.*, 9 Cir. 1956, 231 F.2d 411, to the question here. The facts are distinguishable by the relationship of the Bellingham and Seattle residences attributed to Starkovich.

In Count 2, the appellant was asked if, in fact, he did not live at 9115 North Geneva, Portland, Oregon. Productive imagination to show how the answer could incriminate on this record is required, and if other than sham basis exists for its assertion, the defense should supply, during the trial, some basis for the claim.

Count 4 involved refusal to answer a question asking for a resumé of the witness' educational background. Such a question is asked routinely of witnesses in judicial proceedings daily. Certainly, the tribunal was entitled to know something of the witness, to evaluate his testimony and to identify him. The record fails to support affirmatively the challenged claim of privilege. The conviction on this count should also stand.

In Count 5, the appellant was asked if he ever attended high school. Appellant's brief acknowledged that this and other questions were innocuous, but contends that in their setting, they were "ominous". How, he does not show, other than to attack the objectives of the

Committee and their so-called "dire admonitions", which were only directions to answer.

Count 6 involved refusal to answer whether appellant had ever been in the armed services of the United States or not. This question is also identifying and pertinent. On its face, it is innocuous; it is unlikely to be otherwise in fact. In face of the challenged claim of privilege, no showing has been made to support the claim. We suggest that if any count before the court therein is vulnerable, it is this count because of the testimony of Mr. Kunzig cited on page 34 of appellant's brief. However, these matters cannot be considered in a vacuum. The trial court ruled that under all the circumstances, this claim of privilege (and that in all counts other than Count 3) was not justified. At the time of sentence, the record shows that it was demonstrated by the appellant that fear of self-incrimination did not motivate him in refusal to answer the respective questions and that the claim of privilege was an abuse and sham. On page 55, part 3, Transcript of Proceedings, the appellant addressed the court as follows:

> "My name is Herbert Simpson. I have lived in Portland 33 years. I have a family here; been married 10 years and just had a six weeks old son, December 18. We are buying a home here. We live at 9115 North Geneva Avenue.
>
> "I went to school here, went to Ockley Green Elementary School and to Jefferson High School, where I graduated. That is the extent of my formal education.
>
> "I went to school during the period of the Roosevelt New Deal, at a time when the political climate of the nation was full of the feeling of

growth and democracy. The New Deal was a building period of our county. It was during that time that the trade unions of our country came into their own. I feel I am a product of the great upsurge of democracy during the depression.

"When it became necessary, Your Honor, during World War II, the war against Hitlerism and Fascism, I volunteered for service in the Navy. After I was discharged from the Navy, I went to work in a shipyard and worked as an electrician, even though my background was one better fitted for clerical work. I felt I could serve my country best in the shipyards.

". . . My last steady employment, permanent employment, was when I was working at the United Truck Lines where I was subpoenaed by Mr. Meyer last May . . ."

Appellant clearly shows, as he did by parroting numerous constitutional amendments, that he was opposed to the existence of the Committee and used this method to frustrate it. There was some indication that the appellant was uncertain as to the consequence of the answers which might, in his judgment, constitute a waiver as to directly incriminating questions which might follow. He was mistaken if he claims that answers to these questions would waive dangerous ones. *Starkovich v. U.S., supra.* The fact remains that on the whole record, it appears that the appellant asserted the privilege without, in fact, fearing or having reason to apprehend that the answers to these questions, pertinent for identity of him *as a witness,* would tend to incriminate him. *Rogers v. U.S.,* 340 U.S. 367, 1951.

Appellant took it upon himself to resist what he chooses to assert was a "witch hunting" committee, and

abused the privilege provided by the Constitution, to frustrate the lawfully-constituted Committee of the Congress. Other questions conceivably could have required answers tending to incriminate appellant, and he could, perhaps, have justified, as to later questions, invoking his privilege. Not so, we submit, was his lawful choice to refuse answers to the innocuous questions here charged. *U.S. v. Josephson, supra.*

What the trial court may require of the witness claiming challenged privilege on the basis of self-incrimination is, of course, perplexing, but perplexing questions are not unique to the law. The trial court is best able to evaluate, from all the circumstances, the good faith of the assertion of the privilege. If the questions themselves are clearly incriminatory, the privilege is clear. If the questions are innocuous, as in this case, the court is entitled to have some rational demonstration amounting to "real danger v. imaginary possibility" test applied. *Brown v. Walker,* 161 U.S. 591, 1896. The witness, upon prosecution for refusal after claim of privilege, may, at trial, develop the basis of his claim by testimony of other witnesses or documents showing the setting, if he does not himself choose to take the stand. He may, through his counsel, develop the nature of the facts on which the witness bases his claim, without revealing the facts themselves. To require nothing of a witness in such circumstances as these is to make every man his own judge of his right to silence and to leave a trial judge without any standard to compel testimony of a recalcitrant witness. In this instance, the tribunal was a Congressional Committee. Throughout

the cases involving similar refusals to respond to questions on the basis of self-incrimination, the researcher will find co-mingled reference to cases involving Congressional Committees, grand juries and courts. If a special standard is to be applied to Congressional Committees, we suggest that a clear enunciation by the courts is required in order that dangerous precedent may be avoided which may frustrate the established power to effectively compel testimony in other forums. Such dangerous precedent is unnecessary to do justice here. Appellee submits that historically the drafters of the Fifth Amendment would have made any special standard applicable to a witness before a Congressional Committee as favorable as possible to the Congress for its inquiry.

IV.

COURT DID NOT ERR IN ITS RULINGS ON PROCEDURAL MATTERS.

A. Motion for Subpoena Duces Tecum and for Inspection Prior to Trial Was Properly Denied.

Appellant filed a motion for subpoena duces tecum and inspection prior to trial (Tr. of Rec. 33) which sought the production of:

> ". . . all papers, documents, notes, reports and summary of information in their hands or under their control or which comprise a part of the records of the Un-American Activities Committee of the Congress, which contain any information pertaining to defendant, that was in the possession of said witnesses and/or said Committee, on or prior to June 19, 1954 and especially any information about the residence, education, armed service record and employment of defendant and any infor-

mation about the political affiliation, meetings and activities of defendant."

Appellant's motion was properly denied, whether it be considered a motion for discovery and inspection under Rule 16 of the Federal Rules of Criminal Procedure or a motion for a subpoena duces tecum and inspection prior to trial under Rule 17(c) of the Federal Rules of Criminal Procedure.

1. *Rule 16 Inapplicable.*

Rule 16 provides for a very limited right of discovery in criminal cases. The four requirements for pretrial discovery under Rule 16 are set forth in *U.S. v. Mesarosh,* D.C. Penn. 1952, 13 F.R.D. 180:

"(1) The evidence must consist of tangible objects, i.e., books, papers, documents, etc.

"(2) These objects must belong to defendants or have been obtained from the defendants or from others by seizure or by process.

"(3) There must be a showing that the objects sought are material to the preparation of the defense.

"(4) There must be a showing that the request is reasonable."

Appellant has failed to fulfill these requirements, particularly as no showing was made that the objects which he sought were taken from him or from others by seizure or by process. *U.S. v. Black,* D.C. Ind. 1946, 6 F.R.D. 270; *U.S. v. Rosenberg,* D.C. N.Y. 1950, 10 F.R.D. 521; *U.S. v. Chandler,* D.C. Mass. 1947, 7 F.R.D. 356; *U.S. v. Pete,* D.C. D.C. 1953, 111 F.Supp. 292.

2. *Rule 17(c) does not Provide for Discovery.*

Rule 17(c) of the Federal Rules of Criminal Procedure provides for the usual subpoena duces tecum for the production of evidence. In addition, it provides that the court may, in its discretion, direct that the subpoena duces tecum be returned prior to trial and may permit the documents and objects subpoenaed to be inspected by the defendant prior to trial. The limited right of pretrial discovery provided by Rule 16 has not been enlarged by any provision of Rule 17(c). *U.S. v. Carter,* D.C. D.C. 1954, 15 F.R.D. 367.

The distinction between these rules has been drawn by Judge Holtzoff in *U.S. v. Maryland & Virginia Milk Producers Assn.,* D.C. D.C. 1949, 9 F.R.D. 509:

> "(1) The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.
>
> "(2) In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purpose of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.
>
> "(3) It is well settled that in a criminal case, unlike a civil action, such a right of broad discovery does not exist. As I said before, Rule 17(c) was not intended to be a discovery provision, but merely a means to make a subpoena duces tecum returnable prior to the trial in order

> that time at the trial may be saved while documents are being examined and inspected."

In *Bowman Dairy Co. v. U.S.*, 341 U.S. 214, 1951, which is a leading case on that subject, these rules are distinguished:

> "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the Clerk, with the provision that the Court may direct that the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. *Rule 17(c) was not intended to provide an additional means of discovery.* Its chief provision was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." (Emphasis added.)

3. *No showing of "Good Cause" under Rule 17(c).*

Under the rule stated in the *Bowman Dairy case, supra,* appellant was required to show good cause before the trial court should exercise its discretion to grant an order for production and inspection of documents before trial. The requirements of "good cause" are set forth in *U.S. v. Cohen,* D.C. N.Y. 1953, 15 F.R.D. 269:

> "Documents which are obtainable, if at all, under rule 17(c) may be obtained from the Government under conditions indicated in the discussion in the Bowman opinion which have been well codified by Judge Weinfeld in United States v. Iozia, D.C. S.D. N.Y., 13 F.R.D. 335, 338, as follows:
>
> '(1) *That the documents are evidentiary and relevant;*

'(2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;

'(3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;

'(4) That the application is made in good faith and is *not intended as a general fishing expedition.*'" (Emphasis supplied.)

A motion to inspect under Rule 17(c) is limited to those documents which are evidentiary and relevant. The reason for this rule is explained by Judge Holtzoff in *U.S. v. Carter, supra:*

> "Manifestly a subpoena duces tecum may be used only for the production of documents that are admissible in evidence, and in addition, at most, for the production of documents that may be used for the purpose of impeaching a witness called by the opposing party. A subpoena duces tecum may not be used for the purpose of discovery, either to ascertain the existence of documentary evidence, or to pry into the case of the prosecution. That this was the intention of the draftsmen of the rules is indicated by the Committee notes to the Second Preliminary Draft of the Rules."

The documents, reports, summaries and work sheets sought by appellant were not evidentiary, relevant or material to his defense. At the time of the motion, the appellant contended that the documents and summaries sought were material in that they would show that the Congressional Committee knew the answers to the questions at the time of the Congressional hearing and that such knowledge by the Committee, its counsel and in-

vestigators, should constitute a defense to the present charge. Whether the Committee, its counsel or investigators had any information or evidence with respect to the answers to the questions put to the appellant is wholly immaterial. The Committee would still have the right to ask the questions to identify the witness. It would have a right to verify and confirm any data or information which it had previously secured. It would be the Committee's duty to convert its unconfirmed data and information into a sworn record for use by the Congress. Because the documents, summaries and reports if any which the Committee had before them at the time of the interrogation of the appellant, were not material to appellant's defense or admissible in evidence in this case for any demonstrated purpose, they cannot be reached by subpoena duces tecum or inspected prior to trial.

Appellant also contends that the documents and reports sought were material in that they would show that "appellant had good grounds under the Fifth Amendment to refuse to answer the questions propounded". No showing was made, however, by the appellant, that the appellant knew, at the time of the Congressional hearing, of the existence or contents of the documents and reports before the Committee, nor was any showing made that the specific information in these documents and reports would have provided appellant with good grounds, under the Fifth Amendment, to refuse to answer the questions propounded, or that they were not simply work papers. Information in the records and files of the Committee, the contents of

which were unknown to the appellant and which had not been brought to his attention directly or by publication, could not possibly become material evidence necessary for appellant's defense in refusing to answer these questions on the grounds of the Fifth Amendment.

In *Morford v. U.S., supra,* defendant was charged with violation of 2 U.S.C.A., Sec. 192, and filed a similar motion for subpoena duces tecum, which was summarily disposed of as follows:

> "We think it unnecessary to prolong this opinion by discussing in detail the appellant's argument . . . that it was error to refuse him access to the confidential files of the Committee other than the material therefrom adduced by the Government in support of pertinency; . . . Suffice it to say that we have examined these contentions with care and have concluded that the trial court did not err in any of those respects."

The broad general demand for all reports, documents and records in possession of the Committee marks the motion for subpoena duces tecum as a fishing expedition and attempt to rummage through the Committee's file for purposes outside of the case.

The documents called for by a subpoena duces tecum must be specified with reasonable particularity. *In re Eastman Kodak Co.,* D.C. N.Y. 1947, 7 F.R.D. 760. It appears clearly within the discretion of the court to deny appellant's dragnet motion to bring in all of the books, papers, documents and records of the Committee. *U.S. v. Giglio,* D.C. N.Y. 1954, 16 F.R.D. 268.

4. *The Pretrial Inspection Provision of Rule 17(c) Rests within the Sound Discretion of the Trial Court.*

Rule 17(c) provides that the court *"may"* direct the production of books, etc. before trial and *"may"* order their inspection prior to trial. It follows that the question whether the materials are to be produced and inspected prior to trial rests within the sound discretion of the court. *U.S. v. Mesarosh, supra; U.S. v. Schneiderman,* D.C. Calif. 1952, 104 F. Supp. 405; *Remmer v. U.S.,* 9 Cir. 1953, 205 F.2d 277.

In the *Bowman Dairy* case, *supra,* the trial court, in the exercise of its discretionary authority under Rule 17(c), granted pretrial inspection of certain documents, the court having first found the materials to be evidentiary. In *Remmer v. U.S., supra,* this court demonstrated that the *Bowman* case does not afford a defendant pretrial inspection as a matter of right, but that the matter still remains within the sound discretion of the trial court:

> "The Supreme Court in that case held that the trial court had the power to order the Government to produce certain documents. It did not hold that a refusal to grant the motion to produce would have been an abuse of discretion."

B. Appellant's Motion for Continuance Was Properly Denied.

On January 13, 1955, appellant filed "Motion for Subpoena Duces Tecum and Inspection or for Dismissal or Postponement" (Tr. of Rec. 33). With respect to postponement, this motion requested:

> "6. That in the event that the court fails to dismiss the indictment herein, the trial of said cause be postponed and continued until such time as the witnesses and evidence sought in this motion be produced and made available in court." (Tr. of Rec. 34.)

The motion for subpoena duces tecum and inspection was heard January 19, 1955, together with similar motions in the *Donald M. Wollam* and *John Rodgers MacKenzie* cases set for consecutive trial at same time and place. The court denied the motion in the *Wollam* case, which was the first case set for trial, and indicated that the similar motions in the present case and the *MacKenzie* case would also be denied, though final ruling thereupon was held in abeyance pending any developments which might occur during the trial of the *Wollam* case (Tr. of Proc., part 1, page 9). On January 20, 1955, after the jury was empaneled in the present case, the court denied the motion for subpoena duces tecum and inspection (Tr. of Proc., part 2, page 3), whereupon appellant moved that the case be continued and stated the grounds to be:

> "I am unprepared at this time to present an adequate defense for the defendant. I am unprepared with necessary witnesses on behalf of the defendant. Part of that reason is that I had hoped and depended on the fact that evidence might be presented through the witnesses that we sought to subpoena in my motion for a subpoena duces tecum, and I took steps toward that end in due time. I believe that the original motion was filed about a month ago. The supplemental motion was filed considerably later, but both were under consideration until Wednesday morning, which is yesterday.

> "For want of evidence that I would hope to present as a result of that motion, it is necessary for me to take steps to take depositions, some in Washington, D. C., and it is necessary for me to subpoena other witnesses. Some of them may be available in this community, but nevertheless I have not had the time or the opportunity in view of the late ruling on my motion to either take the depositions or subpoena the necessary witnesses." (Tr. of Proc., part 2, pages 5 and 6).

Appellant's motion for continuance to secure additional witnesses and evidence was properly denied in that appellant failed to support the motion with a showing by affidavit or otherwise, with respect to:

1. The name, identity and location of proposed witnesses.
2. Why the witnesses have not been produced for trial.
3. The diligence of appellant in taking necessary steps to secure the proposed witnesses.
4. A definite statement of the specific nature or purport of the proposed testimony.
5. That the proposed testimony would be admissible, material and relevant to the defense.

The failure to show the name, identity and location of the proposed witnesses was alone sufficient ground to deny continuance. *U.S. v. Kennedy,* D.C. Minn. 1930, 45 F.2d 433; *Farmer v. U.S.* 4 Cir. 1950, 183 F.2d 328. At no time did appellant identify the witnesses sought. The record merely shows some broad statements about un-named possible witnesses in Washington, D. C. and "in this community". (Tr. of Proc., part 2, page 6).

No showing was made of due diligence by appellant's taking proper steps to secure the presence of these

witnesses at the time of trial, nor was any explanation made why the witnesses were not present at trial time with the other defense witnesses. Such failure was adequate ground for denying the motion. *Johnson v. U.S.*, 8 Cir. 1929, 32 F.2d 127; *Chastain et al v. U.S.*, 5 Cir. 1943, 138 F.2d 413. Appellant was not surprised by the court's ruling upon the motion for subpoena duces tecum and inspection. On January 12, 1955, appellant's counsel was advised that the motion would be opposed. (Tr. of Rec. 37). On January 19, the court clearly indicated that the motion would probably be denied. (Tr. of Proc., part 1, page 9). Appellant apparently attempted to put the court in the position where it would have to either grant the motion for subpoena duces tecum and inspection or grant a continuance. Certainly diligence was not exercised in failing to take any steps to secure the proposed witnesses in anticipation of what the court's ruling might be on the motion for subpoena duces tecum. Appellant's hope that the court would grant the motion for subpoena duces tecum was not a sufficient excuse for his lack of diligence in securing the other witnesses.

Failure of appellant to show specific facts to which the absent witnesses would testify and that such testimony was material to the defense, likewise justified denial of continuance. *Babb et al v. U.S.*, 5 Cir. 1954, 210 F.2d 473; *Alaska Pacific Fisheries v. U.S.*, 9 Cir. 1921, 269 F. 778; *Godsey v. U.S.*, 6 Cir. 1927, 17 F.2d 877. As pointed out in the *Babb* case, "a motion for continuance based on the absence of a witness should be specific and state substantially what the witness

would testify to if present, and show wherein the absent witness' evidence would be material and competent." No statement was made by appellant as to the nature of the testimony expected from the proposed witnesses. The appellant merely stated that the additional witnesses were needed to supply evidence which appellant might otherwise have secured had the subpoena duces tecum been granted. It will be recalled that appellant sought the records of the Committee in order to show that the Committee already knew the answers to the questions propounded. For the reasons stated previously, such evidence was wholly immaterial to the issues in this case. Appellant now contends that, in addition, witnesses were needed to show that the purpose of the Committee was not legislative but to cause appellant to lose his job and be subject to adverse publicity. Similar evidence was held inadmissible in *Morford v. U.S., supra,* in which appellant sought to prove that the sole purpose of the Committee was to add the name of the appellant to its "black list". In affirming the exclusion of such evidence as being immaterial, the court held:

> "This assignment of error charges the Committee was not acting in furtherance of a legislative purpose in seeking the information which Morford refused to give. It is held, however, that a legitimate legislative purpose is presumed when the general subject of investigation is one concerning which Congress can legislate, and when the information sought would materially aid its consideration. McGrain v. Daugherty, 273 U.S. 135, 177-178, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1. That presumption arises here, and it cannot be rebutted by impugning the motives of individual members of the Committee."

Appellant's motion for continuance was renewed at the end of the government's case. The grounds assigned were the same as those which have been discussed previously (Tr. of Proc., part 2, pages 108-110). In particular, we observe that the appellant was unable to furnish the court with the name of any proposed witness. In addition, appellant contended that he desired to produce testimony to show that the purpose of the Committee was not legislative, which evidence appellee reasserts was immaterial. See *Morford v. U.S. supra.*

A motion for continuance is directed to the sound discretion of the trial court, whose ruling should not be disturbed on appeal in the absence of a clear showing of abuse. *Kramer v. U.S.,* 9 Cir. 1948, 166 F.2d 515; *Isaacs v. U.S.,* 159 U.S. 487, 1895; *Remmer v. U.S., supra.*

C. Jury Properly Empaneled and Qualified.

In Specification of Error No. 3, appellant argues that the court erred in permitting the trial to continue before the jury empaneled. The record is not clear as to whether appellant is objecting to the specific jury which heard this case, or whether his objection is to the entire array from which the jury was selected. For this reason, it becomes questionable as to whether appellant has properly raised the issue as to the competency of the jury which returned the verdict in the present case in a manner which can be considered by the court.

Appellant's objection to the array is without merit. In the case of *Cwach v. U.S.,* 8 Cir. 1954, 212 F.2d 520, which involved an alleged violation of the Mann Act,

the defendants assigned as error the trial court's refusal to dismiss the jury panel because some of its members had previously passed on the credibility of the prosecuting witness in a case involving other defendants. It appeared that the prosecuting witness had testified in a Mann Act case previously and that two of the jurors who sat in that previous case were called in the *Cwach* case. The defendants used six of the ten preemptory challenges allowed and struck one of these two jurors, leaving the other on the jury. The court stated on page 529:

> "There is no showing that this juror entertained any preconceived convictions as to the credibility of witness Jordell which might have been unfavorable to the defendants. The existence of prejudice cannot be presumed. In *Haussener* v. *U.S.*, 8 Cir. 1925, 4 F.2d 884, a case involving prosecutions under the National Prohibition Act, it was held that the fact that five of the jurors had previously sat in similar cases against other defendants, wherein the same government witnesses testified, was insufficient to disqualify them absent a showing that their attitude was such as to preclude a fair and impartial trial. No attempt having been made to show the juror in this case was biased or prejudiced by reason of having heard Gloria Jordell testify previously, the ruling of the trial Court is sustained."

If, on the other hand, appellant is objecting to the jury selected in the case under consideration, his objection is equally without merit. The record shows that it was the trial court's opinion that he fully, and in very emphatic terms, asked the jurors as to whether their participation in the earlier case would affect their deliberation in the present case (Tr. of Proc., part 3, page 16). Since appellant has not included in the record the

voir dire examination and instruction to the jurors prior to their being sworn, there is not anything in the present record before the court which shows that the jurors were not properly instructed in the ordinary and usual manner, that their verdict should be based on the evidence in the present case and not affected by the case tried on the previous day. The presumption that the usual instructions were given is strengthened by the references to them in the record. (Tr. of Proc., part 3, pages 16 and 17).

In the case of *Belvin v. U.S.*, 4 Cir. 1926, 12 F.2d 548, which was a case involving the alleged conspiracy to violate the provisions of the National Prohibition Act, the defendants moved the court to exclude eleven of the jurors subsequently empaneled to try the case, on the ground that they had served in a number of other cases involving violations of the National Prohibition Act in which the witnesses relied on by the government had testified and in which the credibility of those witnesses was necessarily involved. The court, on page 550, stated:

> "The motion to exclude the 11 jurors who had served in other cases was properly denied. The trial judge interrogated them and determined that they were impartial jurors. The exact point had been decided adversely to the contention of defendants by the Circuit Court of Appeals of the Sixth and Eighth Circuits. (citing cases)"

There is no presumption either in fact or in law that the mere sitting upon a similar case gives rise to an actual or implied bias in the mind of a juror. *Cwach v. U.S., supra; Haussener v. U.S., supra; Ramos v. U.S.*, 1

Cir 1926, 12 F.2d 761; Annotation 160 A.L.R. 753 at page 756.

In the case of *Wilkes v. U.S.*, 6 Cir. 1923, 291 F. 988, which was a case involving alleged conspiracy to violate the Reed Amendment, the court stated on page 990:

> "Some of the jurors in attendance upon the session had been present in court during the trial of other cases of the general group referred to, and some had sat in some of the other cases. Defendants moved to dismiss the array, and for a new array of jurors, for the reasons just stated, coupled with the proposition that the evidence being similar to the evidence in this case such jurors had passed upon the credit or lack of credit of Taylor and his wife, and had formed or expressed opinions as to the whole series of cases growing out of the indictments in question. Whether or not the practice of moving to dismiss the array was a proper one, it was not error to deny the motion. There was under it no showing of fact that the jurors had either formed or expressed opinions as to the merits of the instant case. There is no presumption of law that they did do so, nor any presumption that a juror who has heard the evidence in one of the cases, or even sat in one or more cases, will be other than impartial in another case merely because it is of the same general type. Each case involved differing conditions and questions of credibility on the part usually of different defendants, and the credibility of both Taylor and his wife was required to be weighed not only upon the facts of the individual case, but as between these witnesses and different defendants."

Before the defendants can claim prejudicial error on the part of the court in keeping certain jurors in the case, it must be established that the defendant exhausted all of his preemptory challenges. There is no showing in

this record to that effect. *Hayes v. Missouri,* 120 U.S. 68, 1887, at p. 70; *Hopt v. Utah,* 120 U.S. 430, 1887, at p. 436; *Spies v. Illinois,* 123 U.S. 131, 1887, at p. 168; *State v. Humphrey,* 63 Or. 540, 128 P. 824, 1912; *State v. Sack,* 62 Or. Adv. Sheets, p. 1271, 1956.

The burden of showing that the defendant was prejudiced by the jury as constituted or by the panel or array is upon the defendant-appellant. *Reynolds v. U.S.,* 98 U.S. 145, 1878; *U.S. v. Dennis,* 2 Cir. 1950, 183 F.2d 201; aff. 341 U.S. 494, 1951; *U.S. v. Handy,* D.C. Penn. 1955, 130 F. Supp. 270; aff. 3 Cir. 1955, 224 F.2d 504.

The trial court determined that there was no error (Tr. of Proc., part 3, page 16) and this determination should not be set aside without a showing of abuse of discretion. No such showing has been made. *Kempe v. U.S.,* 8 Cir. 1947, 160 F.2d 406; *Robinson v. U.S.,* 6 Cir. 1944, 144 F.2d 392; *U.S. v. Chapman,* 10 Cir. 1947, 158 F.2d 417; *Bratcher v. U.S.,* 4 Cir. 1945, 149 F.2d 742.

The attention of the court is respectfully invited to that portion of 31 Am. Jur., Jury, Sec. 162, page 676, immediately following the quotation set forth by counsel in this brief on page 13, which states:

> "This rule has been applied where one of the parties was the same in both cases. There is no error in refusing to sustain such a challenge where the record is deficient in bringing out the identity of the issues, and the mere suggestion of counsel is not sufficient proof of such fact."

It is submitted that the retention of the jury panel and the selection of the jury in this case was without error.

D. Court did not Err in the Admission or Rejection of Evidence.

In alleging error as to the admission and rejection of evidence, appellant has not complied with Rule 18(2)(d) of this court. The specifications of error fail to state (1) the grounds urged at the trial for the objection, (2) the full substance of the evidence admitted or rejected and (3) the pages of the Transcript of Proceedings where the same may be found.

In the argument, under Specification of Error No. 5, appellant contends the court erred in admitting the testimony of Mr. Kunzig, with respect to the number of persons required to be on the Subcommittee.

At the outset, it should be observed that no objection was made by appellant at the time of the hearing, to the validity of the Subcommittee. The question of validity of the Subcommittee cannot be raised for the first time at the time of trial. In this case, the appellant relied on other grounds in refusing to answer the questions propounded. The validity of the Subcommittee, therefore, was no longer an essential element of the offense. *U.S. v. Bryan,* 339 U.S. 323, 1950; *Emspak v. U.S.,* D.C. Cir. 1952, 203 F.2d 54, reversed on other grounds, 349 U.S. 190, 1955, *supra.* In the *Bryan* case, the question of a proper quorum of the Committee was raised for the first time at the time of trial. The Supreme Court held that the government was not required to prove that a quorum of the Committee was present when the default occurred, and that under the circumstances, the defense of lack of a quorum was not open to the witness.

Though not technically required to do so, it was the purpose of the government, in asking the subject question, to show that the Subcommittee before whom appellant appeared was validly constituted and had a quorum present at the time. Appellant's contention that this testimony violated the "best evidence rule" is not supported. It is well-settled that when the matter to be proved is a substantive fact which exists independently of any writing, oral evidence of one who has personal knowledge of the facts is admissible. The fact in question was the number of persons required to be on the Subcommittee. Although this could be proved by the records of the Committee, it may be equally proved by oral testimony of a person having personal knowledge of the facts. The "best evidence rule" only comes into operation when there is a question as to the *contents* of a document or writing, in which case the best evidence of the contents would be the document or writing, itself. In *Herzig v. Swift & Co.,* 2 Cir. 1945, 146 F.2d 444, it is observed that "The federal courts have generally adopted the rational limiting the 'best evidence rule' to cases where the contents of the writing are to be proved." Oral testimony was held admissible in that case to prove certain facts, even though those facts had incidentally been recorded in the books and records of a partnership. Similarly, in *MacLaughlin v. Hull,* 9 Cir. 1937, 87 F.2d 641, the court admitted oral testimony of a witness testifying from his own knowledge as to the number of persons that had used a particular stairway, over the objection that the books and records recording this information were the "best evidence".

Since the witness in this case had a distinct and independent recollection of the matter and was personally present at the time, his testimony is competent as to these facts, even though they may have been recorded in the records and minutes of the Committee. *In re Ko-ed Tavern,* 3 Cir. 1942 129 F.2d 806; *Maier v. Publicker Commercial Alcohol Co.,* D.C. E.D. Penn. 1945, 62 F. Supp. 161; aff. 3 Cir. 1946, 154 F.2d 1020; 4 *Wigmore on Evidence,* 3d Ed., Sec. 1178; 32 C.J.S. *Evidence,* Sec. 786, 787.

Under Specification of Error No. 6 appellant contends that the court erred in sustaining objections to questions asked witness Kunzig on cross-examination by appellant. The first of these questions, which appear in the Transcript of Proceedings, part 2, pages 71 and 72, concerned the matter as to whether witnesses called before the Committee had thereby lost their employment. As more fully covered in other portions of this brief, these questions were entirely immaterial and irrelevant. For example, in *Morford v. U.S., supra,* the defense attempted to offer evidence to show that the purpose of subpoenaing witnesses before the Committee was to add the names of the witnesses to the Committee's "black list" and facilitate the Committee's efforts to destroy the effectiveness of the group to which the defendant belonged. The court pointed out that such evidence was immaterial and that the legislative purpose of the Committee could not be rebutted by impugning the motives of the Committee. We also observe in passing, that 2 U.S.C.A., Section 193 provides that:

> "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress . . . upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

It follows that a witness may not refuse to testify before the Committee on the ground that it might cause him to lose his job.

Appellant next contends that it was error for the court to sustain the objection to the following question asked witness Kunzig by appellant (Tr. of Proc., part 2, page 74):

> "Q Now after this subpoena was served upon Mr. Simpson, was there any reasonable doubt in your mind or the mind of the committee where Mr. Simpson worked?"

For the reasons more fully stated in other portions of this brief, this question was immaterial, as the Committee would have the right to verify and confirm data secured by it and convert it into a sworn record for use by the Congress.

Under Specification of Error No. 6, the appellant also contends that it was error for the court to sustain objections to questions put by the appellant to Mr. Kunzig (Tr. of Proc., part 2, pages 77 and 78) with respect to the cost of securing information. This line of questioning was wholly immaterial and irrelevant to any issue in the case. Congress has the power of testimonial compulsion, which is necessary to carry out its function. In its search for truth, it is certainly not to be confined necessarily to any particular method. It obviously would

not be a defense to this charge that Congress might have secured the information elicited, by some less expensive method.

By its Specification of Error No. 7, appellant contends the court erred in sustaining objections to questions addressed by appellant to witness Joseph Santoiana, Special Agent in Charge of the Federal Bureau of Investigation at Portland, Oregon, as to whether the witness had any information regarding the appellant and as to whether the witness had consulted with any members or employees of the Congressional Committee before whom appellant appeared. (Tr. of Proc., part 2, page 92). This line of questioning was entirely irrelevant and immaterial to any issues in the case. As previously discussed, it would have been immaterial even if the Committee had the information sought to be elicited from the witness. The question as to whether another agency of the government has the information, becomes even less relevant. It is also well-known that the Federal Bureau of Investigation is part of the Department of Justice of the Executive Branch of our Government, whose investigations are carried on in connection with the enforcement of the federal laws and whose reports of investigation are not normally available to the Committees of Congress for use in their investigations for legislative purposes.

Under Specification of Error No. 8, appellant contends the trial court erred in admitting any testimony, on the ground of the insufficiency of the indictment, which subject has been covered previously in this brief. Under the same specification of error, appellant repeats

his contention that the trial court erred in admitting testimony of the witness Kunzig with respect to the rules and purpose of the Committee, on the ground that such testimony was in violation of the "best evidence rule". As more fully discussed earlier in this brief, the testimony of this witness, speaking from his own personal knowledge, was not in violation of the "best evidence rule". In addition, it was unnecessary for the prosecution to prove the validity of the Subcommittee and the presence of a quorum, as no objection was made by appellant at the time of the hearing before the Committee.

E. Court did not Err in Denying Appellant's Request, Made After Verdict, to Present Further Testimony on Issues of Pertinency and Privilege.

In his motion for new trial, appellant contended for the first time, in part 18 thereof (Tr. of Rec. 40) that the court erred in failing to grant appellant the opportunity to present testimony and argument on the claim of privilege. In the same motion for new trial, appellant made the further request, for the first time:

> "Defendant further moves that defendant be permitted to submit further testimony on the issues that the court has confined to itself without the intervention of a jury." (Tr. of Rec. 41)

Appellant was present in court at the commencement of the trial of Donald M. Wollam, which was a similar case tried the day before the present case. At that time, the question was discussed as to whether the matter of privilege would be heard before the court outside of the hearing of the jury, at which time counsel

for Wollam decided to have all of the evidence presented before the jury. (Tr. of Proc., part 3, pages 34, 38 and 39).

At no time in the present case did appellant request that he be permitted to submit testimony to the court outside the hearing of the jury, on either the issue of pertinency or privilege, until the present request was belatedly made following the verdict of the jury. As a matter of fact, appellant produced witnesses which, it is now asserted in his brief, were produced on both the issues of pertinency and privilege.

The trial proceeded on the theory that all of the evidence upon all of the issues would be presented at the trial, within the hearing of the jury, but that the court would determine the issues of pertinency and privilege and the jury would determine the other issues. The court indicated its determination of the issues of pertinency and privilege by the instructions given to the jury, in which the court stated that it had found as a matter of law that the questions propounded were pertinent to the matters then under inquiry (Tr. of Proc., part 2, page 122) and that the court had determined that the appellant was not lawfully entitled to refuse to answer the questions on the ground of constitutional privilege. (Tr. of Proc., part 2, page 129). Following these instructions, in which appellant was advised as to the findings of the court with respect to pertinency and privilege, appellant failed to make any request to present further testimony on these issues and rested his case (Tr. of Proc., part 2, page 114) before the jury retired. Appellant should not be allowed to speculate upon

the verdict of the jury with the idea of requesting an opportunity to present further testimony in the event the verdict is not in his favor. In light of all these circumstances, and particularly the fact that appellant did have an opportunity and did put on evidence with respect to pertinency and privilege at the trial, before the jury, it was not error for the court to deny appellant's request made for the first time in his motion for a new trial, for a further opportunity to present testimony on these issues.

F. Motion for New Trial on Ground of Newly-Discovered Evidence Was Properly Denied.

Following trial, appellant sought new trial on the basis of newly-discovered evidence, in substance reasserting the same matter as in his motions for continuance. No proper showing was made. (Tr. of Proc., part 3, pages 36 ff. 43). The trial court, entitled to discretion in ruling on the motion, did not abuse the discretion. The motion failed to (1) identify the new evidence or witnesses; (2) show (a) that it was unknown at trial time and (b) that it was material, not merely impeaching; (3) show (a) that it would probably produce acquittal or (b) that its delayed discovery was not due to lack of diligence. *Wagner v. U.S.*, 9 Cir. 1941, 118 F.2d 801; cert. den. 314 U.S. 622, 1941.

V.

INSTRUCTIONS WERE FAIR AND COMPLETE.

By its Specification of Error No. 9, appellant has made a blanket contention that the trial court erred in

all respects excepted to by appellant in relation to the charge to the jury. The specification of error, however, does not comply with Rule 18(2)(d) of this court. The alleged erroneous instructions given or instructions refused are not set out *totidem verbis,* together with the grounds of the objections urged at the trial.

Appellant submitted no written requested instructions. (Tr. of Proc., part 2, page 111). Appellant orally requested three instructions. (Tr. of Proc., part 2, page 112). The one with reference to a witness found false in one respect may have his testimony doubted in other respects and the one with reference to the identity of the accused, were given. (Tr. of Proc., part 2, page 121). The orally-requested instruction relating to privilege was not given, as this was an issue for the court.

Following the instructions, the appellant made numerous exceptions to instructions given, mainly on the theory, however, that the questions of pertinency and privilege should have been presented to the jury. (Tr. of Proc., part 2, pages 132, 133 and 134). As more fully discussed elsewhere in this brief, the questions of pertinency and privilege are for the court's determination. *Sinclair v. U.S.; Chapman v. U.S.; Rogers v. U.S., supra.*

CONCLUSION

The appellant had a full and fair trial free from prejudicial error.

The facts of this case are different from those in *U.S. v. Josephson, supra,* in that in *Josephson,* the witness refused to be sworn. Herein, the witness was sworn, gave his name, and then refused answer to all other innocuous questions. No distinction in principle appears. Appellee submits that the *Josephson* case should control this litigation. The claims of privilege were on the record not proper. The conviction should be affirmed.

Respectfully submitted,

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